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Our File No.  
38110-100

September 2, 2021

By ECF

Honorable Lewis A. Kaplan  
United States District Judge  
Southern District of New York  
United States Courthouse  
500 Pearl St.  
New York, NY 10007

**Re: *Kleeberg, et al. v. Eber, et al.***  
**Docket No. 16-cv-9517 (LAK)**

Dear Judge Kaplan:

We represent Defendants in the above-captioned action, which is scheduled for trial on September 14, 2021, and respectfully request that the Court accept this letter response with respect to the motion to compel filed by Plaintiffs yesterday (which has been withdrawn), Doc. Nos. 367, 368, 369, and Plaintiffs' request to amend the pleadings to conform to the evidence.

When we received Plaintiffs' motion to compel yesterday, we were in the process of reviewing issues Plaintiffs' attorney had raised with us to determine if documents have been previously produced and to address the issues concerning documents that either post-date or may not have been covered by document requests served in discovery.

We subsequently provided Plaintiffs' attorney with a responsive email stating that with respect to documents that have been previously produced, Wendy Eber's 2008 W-2s from Eber-CT and Eber W&L were previously produced by Defendants, and Lester Eber's 2017 Schedule C was also previously produced.

In addition, in order to avoid unnecessary motion practice and diversion from trial preparation, we provided to Plaintiff's counsel the following documents:

- Wendy Eber's 2018, 2019, and 2020 W-2s from Eber-CT
- Lester Eber's 2018, 2019, and 2020 Schedule Cs.

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- Lester Eber's 2012 Employment Agreement with Eber-CT.

In addition, although it was not referenced in the motion to compel, we also provided the Eber-CT Financial Statement for 2013-2014 to Plaintiffs' counsel, as that had been part of a prior discussion with Plaintiffs' counsel. We expect to continue to work out issues with Plaintiffs' counsel as they arise in order to avoid burdening the Court with motions.

Plaintiffs' counsel responded yesterday that he would withdraw the motion to compel if we produced an unredacted version of a previously produced 2017 Schedule C for Lester Eber, and a 2008 W-2 for Lester Eber from Eber Bros. Wine & Liquor Corp. ("Eber W&L"). This morning, we provided the previously produced Schedule C with only the social security number redacted, and we advised plaintiffs' counsel that Defendants do not have a 2008 W-2 for Lester Eber from Eber W&L. Plaintiffs have now withdrawn the motion. Doc. No. 369.

With respect to the 2012 Employment Agreement, Plaintiffs' counsel has advised that he seeks to invalidate this transaction and he seeks to have the pleadings amended to conform to the evidence and to allow a claim with respect to this agreement, pursuant to FRCP 15. The issue of a proposed amendment of the pleadings to conform to the proof is premature and is an issue that can be addressed by the Court either at trial or in the post-trial briefing. We respectfully request that a consideration of that issue be deferred until Plaintiffs have presented their evidence and the Court and Defendants will be in a better position to understand the claim Plaintiffs wish to make and address the issue of amendment.

For the reasons stated, we respectfully submit that a conference with the parties on Friday is not necessary with respect to these issues.

Thank you for your consideration of this matter.

Respectfully submitted,

*s/ Kevin P. Mulry*

Kevin P. Mulry

cc: All counsel (By ECF)